

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

De Lage Landen Financial Services, Inc.	:	
	:	
Plaintiff	:	CIVIL ACTION NO. 02-CV-2810
vs.	:	
	:	HON. RONALD L. BUCKWALTER
Toshiba America Medical Systems, Inc.	:	
	:	
Intervenor Plaintiff	:	
vs.	:	
	:	
DeSoto Diagnostic Imaging, LLC., Randon J.	:	
Carvel, Lynn T. Carvel, Delta Radiology, P.C.	:	
and Zobar Properties, LLC.	:	
	:	
Defendants	:	
	:	

ORDER

This matter being brought before the Court by McCarter & English, LLP, counsel for plaintiff De Lage Landen Financial Services, Inc. (the "Plaintiff") on Plaintiff's Motion in Limine Seeking a Determination that Defendants Bear the Burden of Proving Plaintiff Failed to Mitigate Damages (the "Motion in Limine"), and the Court having considered the said Motion and all supporting and supplemental affidavits, certifications, exhibits, documents and briefs, and all opposing affidavits, certifications, exhibits, documents and briefs filed by the Defendants;

It is on this _____ day of _____, 2004 ORDERED as follows:

(1) Plaintiff's Motion in Limine is hereby GRANTED;

(2) At the trial of this matter, Defendants shall be required to prove that Plaintiff failed to mitigate damages.

BY THE COURT:

RONALD L. BUCKWALTER, U.S.D.J.

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and	:	HON. RONALD L. BUCKWALTER
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Toshiba America Medical Systems, Inc.	:	
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Intervenor Plaintiff	:	
	:	
vs.	:	
	:	
DeSoto Diagnostic Imaging, LLC., Randon J.	:	
Carvel, Lynn T. Carvel, Delta Radiology, P.C.	:	
and Zobar Properties, LLC.	:	
	:	
Defendants	:	

**PLAINTIFF DE LAGE LANDEN FINANCIAL SERVICES, INC.'S MOTION IN
LIMINE SEEKING A DETERMINATION THAT DEFENDANTS BEAR THE BURDEN
OF PROVING THAT PLAINTIFF FAILED TO MITIGATE DAMAGES**

Plaintiff, De Lage Landen Financial Services, Inc. ("DLL"), by and through its undersigned attorneys, moves this Honorable Court seeking a determination that Defendants bear the burden of proving that DLL failed to mitigate damages. In support of its Motion in Limine, DLL relies upon the accompanying Memorandum of Law in support thereof, which is incorporated herein by reference. The grounds for the motion and the specific relief sought are set forth in the Memorandum of Law and Proposed Form of Order, which is also being submitted with this Motion.

Dated May 7, 2004

Rosetta B. Packer (Attorney ID No. 28357)
Peter J. Boyer (Attorney ID No. 25517)
Kevin J. Burke (Attorney ID No. 87214)
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Attorneys for Plaintiff
De Lage Landen Financial Services, Inc.

**IN THE UNITED STATES DISTRICT COURT
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De Lage Landen Financial Services, Inc.	:	
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Plaintiff,	:	CIVIL ACTION NO. 02-CV-2810
v.	:	
	:	Honorable Ronald L. Buckwalter
Toshiba America Medical Systems, Inc.	:	
	:	
Intervenor Plaintiff,	:	
	:	
v.	:	
	:	
DeSoto Diagnostic Imaging, LLC., Randon J.	:	
Carvel, Lynn T. Carvel, Delta Radiology, P.C.	:	
and Zobar Properties, LLC.	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF DE LAGE LANDEN
FINANCIAL SERVICES, INC.'S MOTION IN LIMINE SEEKING A
DETERMINATION THAT DEFENDANTS BEAR THE BURDEN OF PROVING THAT
PLAINTIFF FAILED TO MITIGATE DAMAGES**

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Attorneys for Plaintiff
De Lage Landen Financial Services, Inc

I. INTRODUCTION

De Lage Landen Financial Services, Inc. (“DLL”) commenced this diversity action by filing a Complaint against Defendants DeSoto Diagnostic Imaging, LLC (“DeSoto”), Randon J. Carvel (“Randon Carvel”), Lynn T. Carvel (“Lynn Carvel”), Delta Radiology, P.C. (“Delta”) and Zobar Properties, LLC (“Zobar”). The Complaint sets forth causes of action alleging breach of a certain Master Lease Agreement (“Master Lease”) by defendant DeSoto and breach of certain Guaranty Agreements (“Guaranties”) by defendants Randon Carvel, Lynn Carvel, Delta and Zobar for an amount in excess of \$3.25 million. This Motion in Limine seeks a determination that, in the event Defendants are liable to DLL for breach of the Master Lease and Guaranties, Defendants have the burden of proving that DLL failed to mitigate damages as a result of the breach.

II. LEGAL ARGUMENT

It is well settled in Pennsylvania that as a matter of general contract law, a party that suffers a loss as a result of breach of a contract has the duty to make reasonable efforts to mitigate its losses. Somerset Community Hospital v. Allan B. Mitchell & Assoc., 454 Pa. Super. 188, 204, 685 A.2d 141 (1996) quoting, Bafle v. Borough of Muncy, 527 Pa. 25, 588 A.2d 462 (1991). See also, Koppers Company, Inc. v. Aetna Casualty and Surety Company, 98 F.3d 1440, 1448 (3d Cir. 1996). A party’s “duty to mitigate” has been interpreted to mean damages that the plaintiff may have avoided with reasonable effort without undue risk, expense or humiliation are either not caused by the defendant’s wrong or need not have been, and therefore are not to be charged against him. 11 Williston on Contracts, s 1353 at 274 (3d ed. 1968). It is the burden of the breaching party, however, to show that the non-breaching party could have avoided the damages. Somerset Community Hospital v. Allan B. Mitchell & Assoc., 454 Pa. Super at 204.

In order to prove failure to mitigate damages, the breaching party must establish (a) what reasonable actions the non-breaching party should have taken; (b) that those actions would have reduced the damages sustained; and (c) the amount by which the damages would have been reduced. Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d at 1448; accord Fortney v. Tennekoon, 1998 WL 159047, *11 (E.D. Pa. 1988).

In the present case, Defendants assert as an affirmative defense, that DLL had a duty to mitigate its damages. Pursuant to Pennsylvania law, Defendants bear the burden of proving that DLL failed to mitigate damages. Defendants will be required to prove that DLL could have acted in a way that reduced the damages caused by the Defendants and the amount by which the damages could have been reduced. DLL will not be required to mitigate damages if both it and Defendants had an equal opportunity to reduce the damages. See, Somerset Community Hospital, 454 Pa. Super. At 205.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant plaintiff DLL's Motion in Limine and determine that Defendants bear the burden of proving that DLL had a duty to mitigate its damages.

Respectfully submitted
McCARTER & ENGLISH, LLP

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Peter J. Boyer (Attorney ID No. 25517)
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1735 Market Street, Suite 700
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Dated: May 7, 2004

Attorneys for Plaintiff
De Lage Landen Financial Services, Inc

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Defendants	:	

CERTIFICATE OF SERVICE

I, Peter J. Boyer, Esquire, hereby certify that on May 7, 2004, I caused a true copy of the foregoing Plaintiff's Motion in Limine Seeking A Determination That Defendants Bear The Burden Of Proving That Plaintiff's Failed To Mitigate Damages, and Memorandum of Law in support thereof and this Certificate of Service to be served upon the following counsel in this action in the manner indicated:

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PETER J. BOYER